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I. DIRECTION AND THEORY IN CURRENT DEVELOPMENTS

THE JAPANESE CONSTITUTIONAL STYLE

JOHN M. MAKI*

INTRODUCTION

On May 3, 1947, a new Japanese constitution came into effect, some fifty-eight years after the promulgation of Japan's first modern constitution on February 11, 1889. The 1889 Constitution was one product of Japan's headlong, almost desperate, and successful drive toward modernization in the nineteenth century; the 1947 Constitution was the result of a military occupation, a climactic consequence of a crushing defeat in an aggressive war.

The 1889 Constitution established an essentially absolutist form of monarchy based on the concept of imperial sovereignty; however, it did possess some features which, although not unqualifiedly democratic, under different circumstances might have led the nation in the direction of democracy. Unfortunately for Japan it was the absolutist features that colored the constitutional system and favored the rise of the authoritarianism of the 1930-1945 period. The 1947 Constitution was quite consciously designed not only to eliminate the base of the authoritarianism of the immediate past, including the doctrine of imperial sovereignty, but to provide the basis for a thoroughgoing democratic system founded on the doctrine of popular sovereignty.

The 1889 Constitution was an outgrowth of both the requirements and the realities of Japanese society in the critical formative stages of modernization. The 1947 Constitution appeared in a society already modernized, but suffering from the trauma of a military defeat and the near-shattering strains and stresses created by the impact of a military occupation on an already severely dislocated nation.

It would appear to be a constitutional truism that a viable constitution must be in accord with the nation's history, tradition and socio-

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political values. If so it should be equally true that the operational effectiveness of a constitution can be measured by the degree to which the letter of its provisions is transformed into the operations of the institutions, relationships and processes established and governed by that fundamental law and by the extent to which the society has developed a general awareness of the instrument and the system created and controlled by it. Constitutions differ in form, content and theoretical underpinnings as the societies that produce them differ. In like manner, the integration of a constitution into a society is controlled by the totality of the operations of that society. The manner and the form of this integration constitute what may be referred to as "constitutional style."

This examination of Japan's constitutional style is based on the manner in which the following factors have contributed to its development or have become elements of it: past constitutional history, the broad reaction against militarism and authoritarianism, basic constitutional principles, the renunciation of war, the electoral system, the structure of government, the relationship between the government and the people, education and the mass media, the intellectuals, changing social relations, popular controversy and the issue of revision. The conclusion will be that the 1947 Constitution has been firmly woven into the general institutional framework of Japanese society and will endure. Even so, neither the Constitution nor the constitutional style will be immutable; embedded in Japanese society they will change as the society changes.

A caveat is appropriate here. The following discussion of the Japanese constitutional style might easily lead the casual reader to conclude that all Japanese are fully aware of the Constitution, familiar with its content, and actively involved in a pervasive and continuous dialogue on constitutional issues. Such a conclusion would be inaccurate for there is an unquestionable lack of a universal popular consciousness of the Constitution and problems related to it. This is simply a Japanese example of a condition observable in all political societies, including those which take pride in a high degree of political literacy. To summarize: the existence of a constitutional style as a general phenomenon of society is entirely possible even in the absence of a constitutional sense in a considerable proportion of the population.

I. Constitutional History and the Postwar Constitution

A. Early History and the 1889 Constitution

Although the 1947 Constitution is innovative, perhaps revolutionary, Japan has had substantial experience with both quasi and real constitutional systems. Formal written constitutions, in the modern sense, were not a part of Japan's political history. As early as 604 A.D. what became known as the 17-Article Constitution of Prince Shōtoku was promulgated.[1] However useful this may have been as a fundamental set of moral and quasi-legal principles to govern political and administrative relationships at a time of considerable domestic ferment, by no stretch of the imagination could it be regarded as a constitution in the modern sense. During the succeeding twelve centuries of Japanese political and governmental development the country operated under what might be regarded as an unwritten constitution, though its elements changed with the passage of time. The principal features of this quasi-constitutional system included: the location of sovereignty in the imperial throne, no matter how powerless or inactive its occupant might be in government or politics; the office of *shōgun*, the supreme military authority who ruled in the name of the emperor; the elaborate court bureaucracy modelled on that of T'ang China; the political and governmental institutions of Japanese feudalism from the twelfth century onward; and, climactically, the elaborate governmental structure of the Tokugawa period.[2]

Had Japan generated a complex of social, cultural and historical forces to lead its feudal and traditional society into a type of modernization paralleling that of the western world in the last half of the nineteenth century, its pre-modern quasi-constitutionalism might have been adapted to the requirements of a nonfeudal Japan. But that did not occur. The opening of the country in 1853-1854 through the estab-

[1] Though long attributed to Prince Shōtoku, this "Constitution" is currently regarded by Japanese scholars as having been written after his death. *See* 1 G. Sansom, A History of Japan to 1334 51-52 (1958). Sansom has also written a long analysis of this constitution: *The First Japanese Constitution: A Lecture by Sir George Sansom* (published in pamphlet form in 1938 by the Asiatic Society of Japan). A shorter discussion appears in K. Asakawa, The Early Institutional Life of Japan 252-56 (1963).

[2] For a clear, concise description of government in Tokugawa Japan, see Hall, *The Nature of Traditional Society: Japan*, in Political Modernization in Japan and Turkey ch.2 (especially 20-27) (R. Ward & D. Rustow eds. 1964).

lishment of formal treaty relations with the United States and the dramatic overthrow of the Tokugawa regime in 1867-1868 required that Japan, like it or not, embark on the momentous course toward modernization—a course whose content and form was to be determined by societies and forces far outside the stream of Japan's historical continuity.

By 1880 the dictates of political and governmental modernization and the pressures of domestic politics forced the leaders of Japan to make a momentous decision: to draft and promulgate a written constitution.[3] Establishment and operation of a centralized, bureaucratic state (modern by the standards of the 1880's), creation of a basic set of rules to govern the new game of politics brought into being not only by internal political changes but also by injection into the country of new political ideas, attitudes and practices, and response to the demands for a broader sharing of political power all seemed to require that Japan adopt a written constitution. Such an instrument would also be a visible mark of political modernization.

Although the decision in favor of a written constitution was made in 1880, the Constitution itself was not promulgated until 1889. The delay was due to: (1) the deliberate decision of the leaders to monopolize the constituent process in order to insure the framing of an instrument that would conform as closely as possible to what they regarded as an ideal Japanese instrument and that would permit only a limited sharing of political power; and (2) the more obvious fact that the drafting of a document for which there was no precedent in Japanese history required the study of existing constitutional systems in other parts of the world.

Promulgated on February 11, 1889, the Constitution created an absolute monarchy based on the location of sovereignty in the emperor, the concept of imperial sovereignty giving the instrument a firm foundation on Japanese tradition. Although the Constitution established executive, legislative and judicial branches of the government, there was no true separation of powers and certainly no system of checks and balances. Although the wording of the Constitution was

[3] J. PITTAU, POLITICAL THOUGHT IN EARLY MEIJI JAPAN: 1868-1889 (1967), is the best account in English of the constitutional movement, the process of drafting and the development of the emerging constitutional thought of the times. G. AKITA, FOUNDATIONS OF CONSTITUTIONAL GOVERNMENT IN MODERN JAPAN: 1868-1900 (1967) covers some of the same ground; however, Akita is more concerned with the politics of constitutional government than with constitutionalism itself.

somewhat ambiguous on the point, both authoritative commentary[4] and subsequent practice demonstrated beyond doubt that the three powers of government were to be regarded as simply facets of the unitary imperial sovereignty. It was this ambiguity which provided the basis for domination of the governmental process by the executive branch, a consideration that almost automatically led in the direction of full-fledged authoritarian government some decades later.

As a decided innovation, the 1889 Constitution also enumerated certain fundamental freedoms for imperial subjects such as the freedoms of speech, religion, assembly and association. However, the Constitution provided that all of these freedoms could be exercised only "within the limits of the law." As a result the Constitution provided no limits on the government's power to restrict any freedom enumerated in it. Thus, although there was never an absolute denial of freedom even in the darkest period of authoritarian government during the Second World War, there was likewise never an unimpeded freedom to criticize and challenge the government, or indeed the system as it developed under the 1889 Constitution.

Between 1889 and 1930, the development of Japan's government and politics was a blend of the authoritarian elements characteristic of the Constitution—especially the absolute sovereignty of the Emperor and the restrictions on freedom—and ameliorative practices leading in the direction of an at least modified democratization. Ironically, both the authoritarian and the democratic streams were constitutional in the sense that neither came into direct conflict with any provision of the Constitution. Between 1930 and the end of the Second World War the absolutist tenor of the Constitution and the authoritarian currents in Japanese society prevailed and resulted in a thoroughgoing authoritarianism most pointedly expressed in militarism at home and aggression abroad. In a very real sense, both militarism and authoritarianism in Japan were constitutional because no provisions of the 1889 Constitution were suspended or violated.

Because the 1889 Constitution was a true constitution, a characteristic constitutional style developed as the manifestation of its integration into the society. Certainly authoritarianism and militarism were the principal elements of that style, but there were other features as well: "emperor worship," or perhaps more accurately, acceptance of

[4] H. Itō, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (M. Itō transl. 1889). This book is essential for an understanding of the Meiji Constitution. To reprint it would be an important contribution to scholarship.

the ideas of unquestioning obedience to and sacrifice for the Emperor and the throne; ultranationalism; supremacy of the state over the individual; and rejection of anything that smacked of democratic liberalism, socialism or communism. This constitutional style can be described by the single world, *kokutai*, usually translated "the national polity," but used to denominate the uniquely Japanese sentiment of nationality and the structure of the state centering around the imperial institution and, in effect, including all the elements listed above.[5]

B. The 1947 Constitution

When the Second World War ended with the defeat and collapse of the old system, it immediately became clear that the victorious allies led by the United States were determined to uproot both militarism and authoritarianism. The existing system was to be replaced by a new and radically different constitutional framework which would "conform as closely as may be to principles of democratic self-government."[6] It soon became apparent that the pre-existing constitutional system and style were to be subjected to intense pressure.

The story of the drafting of the present constitution is extremely complicated and, even though a massive amount of testimony and evidence has been accumulated, controversy still rages.[7] For present purposes a general outline will provide useful guidelines while avoiding the possibility of debate over details. As early as October, 1945, barely a month after the signing of the surrender documents, General Douglas MacArthur, in his capacity as Supreme Commander for the Allied Powers (SCAP) in charge of the occupation of Japan, notified Prime Minister Kijurō Shidehara that complete revision of the 1889 Constitution would have to be given top priority by the Japanese Government. From then until early February, 1946 the Japanese Govern-

[5] For an excellent brief account of *kokutai*, see J. PITTAU, POLITICAL THOUGHT IN EARLY MEIJI JAPAN, 1868-1889 (1967). S. FUJII, THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW (1940), is an analysis of the Meiji Constitution from the standpoint of the *kokutai* concept, though the concept is not specifically dealt with. J. REED, KOKUTAI: A STUDY OF CERTAIN SACRED AND SECULAR ASPECTS OF JAPANESE NATIONALISM (1940), is an account of the manner in which the concept was woven into the emergent chauvinism and ultranationalism of the mid-1930's.

[6] The quoted phrase is taken from the statement of the ultimate objectives of U.S. policy toward the defeated Japan as stated in *United States Initial Post-surrender Policy for Japan*, 18 DEP'T STATE BULL. 423 (1945), which has been frequently reprinted.

[7] *See* Professor Takayanagi's article on the Commission on the Constitution for a summary statement of the opposing views on the origins of the Constitution, *infra* this symposium at 961. The sub-committee of the Commission which investigated the process of enactment met 49 times with the minutes of these meetings totalling just over 3,000 double-column pages.

ment worked on the problem and submitted several proposed drafts for a new constitution to the occupation authorities. However, General MacArthur and his advisers felt that the proposals adhered too closely to the old Constitution. Finally, in February of 1946, the Government Section of SCAP secretly prepared its own draft. Early in March, this draft was released by the Japanese government as its own. Although both the occupation and the Japanese government strove to maintain the fiction that the draft was a Japanese product, it was an open secret that it was not.

After several extensive revisions of the original draft carried out in close cooperation by GHQ, SCAP and the Japanese government, the document was presented to the Imperial Diet in June of 1946 to initiate the formal revision of the 1889 Constitution. The new document was dealt with as if it were simply an extended revision of the old one, thus maintaining a recognizable degree of constitutional continuity. After extensive and detailed debate the House of Representatives approved the new Constitution on August 24, 1946. The draft was then sent to the House of Peers where it was approved on October 5 after slight amendment. The lower house then approved the amended draft on October 7. On all three occasions the overwhelming majority voted approval.[8] The Constitution was then formally promulgated on November 3, 1946, by the Emperor and became effective on May 3, 1947.

It was perfectly clear that the circumstances under which the Constitution was framed, enacted and promulgated were abnormal. One of the most important circumstances is the undeniable fact that the constituent process was carried out while Japan was under military occupation. Because the Japanese government acknowledged that the "authority of the Emperor and the Japanese government will be subject to the Supreme Commander,"[9] the country was both in fact and under law not sovereign. The other major circumstance was the clear fact that the occupation did play a role (no matter how obscure some

[8] GOVERNMENT SECTION, SUPREME COMMANDER FOR THE ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN: SEPTEMBER 1945 TO SEPTEMBER 1948 111 (1949) (U.S. Government Printing Office), states that the final vote in the House of Peers was 298 to 2 and 342 to 5 in the House of Representatives. However, careful research by both Japanese and American scholars has failed to yield verification of these figures. There was apparently no roll call vote. The two negative votes in the House of Peers were apparently attributed to the two members who spoke against the draft; the five in the lower house to members (four of them communist party members) who stated that they voted negatively.

[9] For a detailed statement on the relationship between the occupation and the Japanese government see Part II of *United States Initial Post-surrender Policy for Japan*, 18 DEP'T STATE BULL. 423 (1945).

of the details might have been) in determining the content of the instrument. These circumstances have led many Japanese to be highly critical of many specific provisions of the Constitution and, even more importantly, have constituted a powerful argument for those who advocate a thorough revision of the present Constitution. I shall deal with these issues from time to time in the remainder of this essay.

To understand both the nature of the new Constitution and the constitutional style based on it, a brief examination of its three basic animating principles is necessary: renunciation of war, guarantee of fundamental human rights, and popular sovereignty. The simple enumeration of the principles reveals the vast difference between the 1889 and 1947 constitutions, and the revelation in turn highlights the "alien" nature of the new fundamental law.

Strictly speaking, renunciation of war is not a constitutional principle. It has nothing to do with the problem of sovereignty; it is only indirectly related to the structure of government and to basic political relationships; and it has no direct bearing on the relationship between government and the governed. But it is a constitutional issue of paramount importance in Japan; and, consequently, it is a distinctive feature of the Japanese constitutional style. It will be a recurrent theme in this discussion. Article 9, setting it forth, reads as follows:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
> 2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential will never be maintained. The right of belligerency of the state will not be recognized.[10]

One of the great constitutional controversies in Japan centers around how and why this article happens to be in the Constitution.[11] Difficult as it may be to resolve the controversy, two facts are self-evident: it is in the Constitution because Japan lost a war to an allied coalition whose principal member, the United States, was determined that Japan was to be prevented from waging offensive war in the

[10] Translations of the Constitution have appeared in many English-language books. The translation relied on in this article is in MINISTRY OF JUSTICE, THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES (1958).

[11] One side of the controversy holds that Article 9 was imposed on Japan by the victorious allies; the other holds that it originated from Prime Minister Shidehara. Professor Takayanagi in his article in this symposium presents a reasoned case for the latter view, *infra* at 961.

future, and it has remained in the Constitution because a majority of the Japanese people warmly supports it.

The principle of popular sovereignty replaces the doctrine of imperial sovereignty of the 1889 Constitution. It is the foundation on which the constitutional structure is erected. In spite of its central significance, the Constitution deals only lightly with it. In the preamble, the following statement appears:

> We, the Japanese people... do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.

In the body of the Constitution, there is only a single and incidental reference to popular sovereignty. Article 1, dealing with the position of the Emperor, reads as follows:

> The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people, with whom resides sovereign power.

This is not the place to discuss the highly technical problem of the nature of popular sovereignty. However, from this concept stem such highly important and diverse constitutional provisions as: the guarantee of fundamental human rights; the position of the Emperor; guarantees for the accused under criminal procedure; legislative supremacy; the relationship between the legislative and executive branches; the role of the judiciary; local government; and the amendment process.

Though the people have replaced the Emperor as the locus of sovereignty, he enjoys a constitutionally defined position. However, he is now only a "symbol" and other provisions of the Constitution deny him "powers related to government" and restrict him to the formal performance of only specifically enumerated "acts in matters of state" (Articles 4, 6 and 7).

It is the principle of popular sovereignty which is the foundation for the broad and firm integration of the people into the political process and for the guarantee against state interference in their rights and freedoms. We shall see in considerable detail how both the principle and its application are essential parts of the constitutional style.

The importance of the principle of the guarantee of fundamental

human rights is underlined by the fact that almost a third of the Constitution, thirty-one of a total of 103 articles, is devoted to it. Among the broad range of political rights and freedoms are the following: the freedoms of thought, conscience, assembly, association, religion, choice of occupation and residence; academic freedom; equality under the law; universal adult suffrage; and the right of workers to organize and to bargain and act collectively. In addition, the Constitution guarantees the following social rights: freedom from discrimination in "political, economic or social relations because of race, creed, sex, social status or family origin"; marriage based on mutual consent of the partners; equality between the sexes in such civil matters as choice of spouse, property rights, inheritance, divorce and other family matters, the right "to minimum standards of wholesome and cultured living"; and equal education correspondent to ability. Finally, articles 31 through 40 contain guarantees of the rights of the accused before the courts.

In striking contrast to the 1889 Constitution, the 1947 Constitution recognizes no formal abridgement on the enjoyment of rights and freedoms. However, Article 12 does contain an abstract restriction, stating that the people should "refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare." Although there has been a degree of controversy, as might be expected, over the meaning of the public welfare, this generalized restriction has not prevented the enjoyment of rights and freedoms.[12]

C. Summary and Appraisal

A review of Japan's constitutional history prior to 1945 and of the circumstances under which the present constitution was framed and promulgated, and a summary of the principles and content of the current constitution clearly demonstrate that twenty years ago Japan's Constitution was not only completely out of tune with the former constitutional style, but with its own society. Indeed, at that time its salient characteristic was its alien nature. The fact that the constituent process had been carried out under a foreign military occupation was perhaps the most patent expression of its alien cast. It seemed divorced not only from the constitution it replaced, but from the country's history, tradition and value system. The consensus, at

[12] *See* Lawrence W. Beer's article in this symposium for a detailed discussion of the doctrine of the public welfare, *infra* at 1095.

home and abroad, was that the new fundamental law could be viewed most charitably as a noble, but naive, experiment and least charitably as a ruthless imposition of the will of the victor on that of the vanquished. Critical in the development of the new constitutional style was that both the spirit and the content of the Constitution, in spite of their alien origin, turned out to meet requirements of a Japanese society involved in a crisis of redirection and adjustment. The rapid development of the constitutional style was a manifestation of the speed of general change in Japanese society after 1945.

As we have seen, two central features of the old constitutional style were authoritarianism and militarism which the occupation was determined to eliminate from Japan. To do so was a natural goal for occupation policy—primarily American—because both had been a threat not only to the United States, but also to Japan's Asian neighbors and, indeed, to the peace and security of the world. What was not so apparent when the Second World War ended was that the great majority of the Japanese people ardently desired to see authoritarianism and militarism extirpated from their society. Not only is the rejection of militarism and authoritarianism a key aspect of the new constitutional style, but it is also one of the strongest currents in popular thought and feeling. To understand this is to understand much about postwar Japanese government, politics and society.

The reason for the deepseated aversion to militarism and authoritarianism is simple: the depth of the traumatic experience suffered by the Japanese people between 1931, the year of the Manchurian Incident which was the opening chapter of the Second World War, and 1945, the year of the A-bombs. The catastrophe of Japan's shattering experience with war engulfed almost all adult Japanese. A review of its principal features shows why there had been a society-wide revulsion against the historical experience with militarism and authoritarianism and an equally wide commitment to bar their return: hundreds of thousands of military and civilian casualties at home and abroad; the disruption of patterns of family life by mobilization, the evacuation of cities, and the shifting of workers; the destruction of family property and family resources directly and indirectly by military action; the destruction or draining away of untold national treasure; the destruction of cities and industrial installations of all kinds; near-starvation, malnutrition, illness and disease born of war and its consequences; the collapse of the dream of empire; the complete discrediting of both

military and civilian leadership; the destruction of the old concept of the national destiny; and the collapse of a system of government and politics deemed not only superior but permanent.[13] In addition, there was an awareness that Japan's acts abroad had made both the country and the people hated and despised, an awareness sharpened by the fact that the Japanese themselves accepted the correctness of the world's judgment of what the nation had done. This awareness led many Japanese to reject their own immediate past and the leadership responsible for it; but more importantly it inspired them to embark on a course that will hopefully guarantee that, by no act of its own, will Japan become involved in a war that will visit such disaster on them again.

Coming as it did less than half a year after the end of the war, Article 9 even in the first draft constituted a dramatic renunciation not only of war itself, but of Japan's own policies and actions, indeed, of Japan's still very recent past. Moreover, for many Japanese it represented at least partial atonement, and a consequent easing of the conscience, for the sins of the government and its armed forces against Japan's neighbors. Additionally, it was regarded by the Japanese as a pledge to themselves and the rest of the world not to return to the past. The psychological role of Article 9 in the Japanese consciousness was further enhanced by the fact that Japan was the first major nation to include such a far-reaching renunciation in its basic law. From the beginning there was also the hope that Japan's action might constitute an example for the rest of the world to follow. Article 9 has been for the Japanese far more than a simple constitutional provision; more, even, than a renunciation of war. This distinctive feature of the constitutional style is a central element of a newly reconstituted Japanese nationalism.

The reaction against authoritarianism was not as clearcut as that against militarism. Its impact was neither as broad nor as direct because it came in the narrower and less directly experienced area of politics. As in the case of militarism, the occupation was determined to end the authoritarian system not only because it was regarded as undesirable in itself but also because it was inextricably woven into the old militarism. Here, too, there was an immediate and effective welcoming

[13] One of the best short accounts of the impact of the allied attack on Japan is MORALE DIVISION, UNITED STATES STRATEGIC BOMBING SURVEY, THE EFFECTS OF STRATEGIC BOMBING ON JAPANESE MORALE (1947) (U.S. Government Printing Office). This is only one of numerous reports prepared by USSBS on the effects of strategic bombing, but it deals the most directly with the effects on the general population.

response from within Japan, not from the generality of the population, but from those who had openly or covertly opposed authoritarianism. Imprisoned, driven underground or forced into acceptance of the authoritarian regime, it was this group who suffered the most at the hands of the militarists and their supporters and who were most keenly aware of what their society had suffered. Their reaction was twofold: warm endorsement of the elimination of the authoritarian regime and even warmer support of the new democratic, constitutional order that was being created to fill the vacuum.

The rejection of authoritarianism plays a dual role in the constitutional style: it keeps the politically conscious alert to any contemporary trend that seems even remotely to resemble authoritarianism; and more importantly, it is the driving force behind the wholehearted support of the present system, especially the guarantee of fundamental human rights, as the best means of preventing the recrudescence of any variation, old or new, on the theme of authoritarianism.

What gave strength and viability to the 1889 Constitution and provided the distinguishing features of its constitutional style was its continuity with the historial past—particularly, imperial sovereignty. What has contributed broadly to the strength and viability of the 1947 Constitution is a general determination to support and maintain a discontinuity between Japanese society, which is generating a new course of development, and the traditional order which has been rejected.

II. Political and Governmental Aspects of the Japanese Constitutional Style

To describe and analyze the Japanese constitutional style is to examine the manner in which the principles and provisions of the 1947 Constitution have developed an interactive relationship with the ongoing processes of Japanese society over the past twenty years. The concern of the remainder of this essay will not be with society and its fundamental law as abstractions, but with the manner in which human beings, as individuals and in groups, have become directly involved in the constitutional process. Two measures of the degree of effectiveness of any democratic constitutional system, no matter what its national stripe, are the enjoyment of freedom and the involvement of the population in the political process through the free exercise of the right of suffrage. These closely related considerations are manifestations of the

principle of popular sovereignty. They also affect the relationship between the government and the people under democratic constitutionalism and the structure of government itself. The ensuing examination of the political and governmental aspects of the Japanese constitutional style will constitute an approach to some broader aspects of that style.

A. The Extent to Which Guaranteed Freedoms are Actually Enjoyed

A critical measure of democracy is the degree to which constitutionally guaranteed freedoms are actually enjoyed. Since the country regained sovereign control over its affairs in 1952, Japan has enjoyed a level of general freedom that is close to the maximum attainable under any system of democratic constitutionalism. No political party or organization is outlawed. All people are free to assemble and to associate as they choose, barring only a threat to the safety of others. The mass media function with perfect freedom; there is nothing resembling the stringent censorship of old. There is no issue that cannot be publicly discussed. The power of the state has not been used to impose general abridgements on civil liberties.

What I am describing here is not a state of perfect freedom, but a general level of freedom. As mentioned above, the constitutionally recognized standard of the public welfare has been applied in individual cases to the freedom of speech where it was exercised in the vaguely defined areas contiguous to libel and obscenity. But the alert exercise of constitutionally guaranteed freedoms of expression has preserved the high level of freedom in general.

Democratic Japan has certainly not been free of threats to its freedom. But the test of performance has demonstrated beyond question that the Japanese are acting simply as if they are what they are, namely, free citizens under the umbrella of a constitution that guarantees them the right to all the fundamental freedoms. Thus, a major constituent element of the Japanese constitutional style is the observable and demonstrable enjoyment of constitutionally guaranteed freedoms.

Whatever the difficulties may be in any attempt to determine either the meaning or the shape of the practical application of the doctrine of popular sovereignty, it is clear that to possess any meaning at all it must include a guarantee of universal adult suffrage exercisable in free elections. Only with this guarantee can the generality of a population

possibly express the yea-or-nay political judgment of their political leadership free from direct intervention or control of governmental authority.

Article 15 of the Constitution guarantees universal adult suffrage. This constitutional guarantee was the culmination of the development of the electoral process in Japan over a period of almost sixty years. The first national election, for the House of Representatives of the old Imperial Diet, was held in 1890. Originally suffrage was granted only to males with certain property qualifications. It was not until 1925 that property qualifications were eliminated, after having been progressively lowered, and universal male suffrage established. Japanese women were not enfranchised until the spring of 1946, under a directive issued by the occupation.

Universal adult suffrage is granted for the election of all public officials. The Japanese electoral system involves balloting for members of the two houses of the National Diet, prefectural governors, mayors and cities, towns and villages, and members of prefectural, city, town and village assemblies. The Japanese electorate enthusiastically discharges its responsibility for exercising the suffrage. The national elections capture the most voter interest with the proportion of those actually casting ballots averaging slightly under seventy-five percent of the number eligible. If popular participation in the electoral process is an indication of a going democratic political system then Japan has one.

Of equal importance is the fact that all of the elections have been free; that is, without governmental control or interference in either the election campaigns or in the outcome of individual contests.

A well-known phenomenon of Japanese party politics is the so-called one-and-a-half party system.[14] Because this system is a critical political issue, it is also a feature of the constitutional style. Since the end of the war a succession of conservative parties has controlled the general elections. The dominant Liberal Democratic Party, established in 1955, has regularly won just under two-thirds of the seats in the Diet and until recently a majority of the popular vote. It has been confronted by a group referred to by the Japanese as the progressive parties—the Japan Socialist Party, the Democratic Socialist Party and

[14] For a brief description of the one-and-a-half party system, see R. SCALAPINO & J. MASUMI, PARTIES AND POLITICS IN CONTEMPORARY JAPAN 53 (1962). A principal theme of this book is an analysis of the system.

the Communist Party.[15] These parties have consistently won a combined total of just over one-third of the seats in the lower house. Their minority position is weakened because they will not combine into a unified opposition, principally for ideological reasons. However, in the January, 1967 general election they garnered some forty-four percent of the popular vote, with the Japan Socialist Party gaining just over a third of all votes. The Liberal Democratic Party obtained just under forty-nine percent of the popular vote.[16]

The one-and-a-half party system has meant not only that the opposition parties have been at a decided disadvantage, but that a true two-party system has not yet developed because there has not been a transfer of power from one party to another through the electoral process. The frustration of the Japan Socialist Party has sharpened its confrontation with its conservative adversary, notably in the great political crisis of 1960 over the United States-Japan security treaty. Political tension developed to such a point that many feared for the continuation of the system of constitutional democracy in Japan; yet it withstood the shock.

Even though the failure to develop a two-party system may be politically undesirable, even to the point where it might create tensions that might adversely effect the constitutional system itself, the issue is political, not constitutional. In other words, the solution of the problem can be worked out within the framework of the present constitutional order without the necessity for constitutional change. However, the one-and-a-half party system must still be regarded as a feature of the Japanese constitutional style because constitutional issues are consistently involved in the discourse between the conservative majority and its minority opposition.

B. The Formal Structure of Government

A constitution, of necessity, establishes the general structure of government and sets forth the principal functions and responsibilities of its major branches. It is the conversion of these constitutional provisions into actual operation that results in the emergence of an identifiable governmental style as a part of the broader constitutional style.

[15] A. COLE, G. TOTTEN & C. UYEHARA, SOCIALIST PARTIES IN POSTWAR JAPAN (1966), is an excellent account of both the socialist movement and the parties since 1945. R. SCALAPINO, THE JAPANESE COMMUNIST MOVEMENT 1920-1966 (1967), is the definitive work dealing with the Japanese Communist Party. No book-length study of the Liberal Democratic Party has yet appeared in English.

[16] Unofficial election statistics are from the Asahi Shimbun, Jan. 31, 1967 (morning edition).

The formal structure of government[17] as established in Japan's Constitution is characterized by the separation of powers, but not by checks and balances as understood under the American system. The result is a system of central government in which the spheres of activity of the three principal branches of government are clearly, if generally, defined, but among which exists what might be designated a balance-of-power rather than checks and balances system.

The 484-member House of Representatives and the 250-member House of Councillors of the National Diet make up "the highest organ of state power" and "the sole law-making organ of the State."[18] The Diet has both direct and indirect control over the national finances. The lower house, because it is more broadly representative, occupies a position superior to that of the upper house. It is empowered to override an adverse upper house vote on the same bill, and in the event the upper house fails to act on a bill, treaty, or the budget the decision of the lower house stands as the decision of the Diet.

The Constitution provides that executive power is vested in the Cabinet. The head of the Cabinet is the Prime Minister who must be a member of the National Diet, designated by Diet vote, and formally appointed by the Emperor. The Prime Minister is empowered to appoint his ministers of state, but the Constitution requires that a majority must come from the Diet. The Prime Minister can remove his ministers at will. In their breadth and complexity of operation, the twelve ministries and seven major agencies of the Cabinet constitute an administrative leviathan comparable to that of any major contemporary government.

Finally, the Constitution provides that the "whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.[19] The Chief Justice of the Supreme Court is appointed by the Emperor, but designated by the Prime Minister, not the Diet. Japan has a unitary judicial system; that is, all courts from the Supreme Court, through the high and district courts, down to the summary courts are part of a single national system administered through the Supreme Court.[20]

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[17] Brief accounts of the organization of the Japanese government may be found in A. BURKS, THE GOVERNMENT OF JAPAN (1964); T. MCNELLY, CONTEMPORARY GOVERNMENT OF JAPAN (1963) and W. TSUNEISHI, JAPANESE POLITICAL STYLE (1966).

[18] JAPANESE CONST. art. 41.

[19] JAPANESE CONST. art. 76.

[20] For a fairly detailed description of the Japanese judicial system see in J. MAKI, *Introduction*, COURT AND CONSTITUTION IN JAPAN, at xv. (1964).

The Constitution clearly allocates exclusive legislative power to the National Diet, executive power to the Cabinet, and judicial power to the judiciary. It also explicitly states that the legislative branch is the highest organ of state power, apparently establishing the doctrine of legislative supremacy. Yet, in action, this constitutionally established governmental style has undergone what appears to be significant modifications, but without apparent strain to constitutional government.

C. The Actual Operation of Government

The designation of the National Diet as "the highest organ of state power" is strengthened by a series of other constitutional provisions that seem to establish firmly the idea of legislative supremacy. The Prime Minister must be a Diet member, designated by a vote of his fellow Diet members; a majority of his ministerial appointees must also be Diet members. These requirements constitute not only a close linkage between the legislative and executive branches, but seem to place the legislative branch in a dominant position. Exclusive control over the law-making process, the power of decision over the budget, and the power of approval of treaties seem to guarantee legislative supremacy. In addition, the Constitution empowers the Diet to force the resignation of a cabinet by passing a non-confidence resolution or failing to pass a confidence resolution, provided that the Prime Minister does not anticipate such a move by dissolving the House of Representatives. Finally, the "whole judicial power" is to be exercised by the constitutionally established Supreme Court and "such inferior courts as are established by law." Since the Diet is "the sole law-making organ of the state" it would seem that the power to establish inferior courts was another manifestation of legislative supremacy.

The actual functioning of Japanese government has resulted in a situation in which the executive has emerged in the position of supremacy. The cause is not a willful violation of the letter of the Constitution, but a simple manifestation of the phenomenon of executive domination in modern government.

As the modern nation-state has grown in complexity, the economic, political, social and diplomatic problems have likewise grown vastly more complicated; these problems now involve many individuals, require the adjustment and conciliation of demands of an ever increasing number of interest groups, and call for much more skill, to say nothing of the expenditure of funds, to mechanically handle the human

and material resources of the society. Japan has proved to be no exception. The result has inevitably been a tremendobus growth in the administrative structure, a great increase in the number of civil servants,[21] a deeper and deeper penetration of administrative action and hence administrative control into every corner of the land and the society.

The weight of executive power is most obvious in the drafting of legislation and the operations of the bureaucracy. Though the Diet is incontestably the "sole law-making organ of the state," in actual practice the Cabinet has been the sole law-originating organ of the state. Virtually all important legislation originates with the Cabinet and all bills are either drafted or reviewed by the Cabinet Bureau of Legislation. The basic reason for this is obvious: the Cabinet's responsibility for and consequent intimate involvement in the ongoing affairs of Japanese society. An easy conclusion might be that the power to originate legislation has become the power to make laws.

Such has not been the case. The Diet, more specifically the opposition parties, has vigorously opposed government bills on both political and substantive grounds. In a few cases it has succeeded in killing certain bills, in others in forcing a delay in passage until a later session.[22] In all cases the government and the majority party have been forced to defend their positions in the best parliamentary tradition. However, the debate has not always been confined within the limits of either parliamentary procedure or parliamentary decorum. The same situation exists in regards to the budget. While the Cabinet is responsible for the preparation and presentation of the budget, it must also fight hard to justify the same both in committee and during debate.

It is impossible to understand the nature and operations of contemporary Japanese government without understanding both the past and the present role of the bureaucracy. At the time of the creation of the modern governmental structure (around 1870) the leaders of the newly created nation were acutely aware of the basic importance of a corps of trained civil servants. A modern bureaucracy was rapidly

[21] In 1964 the total number of government employees was 1,878,193 (including approximately 225,000 in the public corporation for telegraph and telephone, about 455,000 in Japan National Railways, about 305,000 in the postal service and about 275,000 in the Self Defense Forces), compared with 1,565,248 in 1956. *See* Table 265 in OFFICE OF THE PRIME MINISTER, 1964 JAPAN STATISTICAL YEARBOOK 464 (1965). Japan's population in 1964 was 97,200,000.

[22] An outstanding example of the killing of a bill was the forced withdrawal of a proposed revision of the Police Duties Execution Law in 1958. *See* J. MAKI, GOVERNMENT AND POLITICS IN JAPAN 196-97 (1962), for a brief account.

established, which successfully carried out its basic duty of administering the affairs of government. Because it was indispensable to the nation, because it represented an honorable career, and because it developed as a tightly knit organization around which government revolved, the bureaucracy became one of the dominant power groups within the country. And because of the pervasive nature of pre-authoritarian and authoritarian government in Japan, the presence of bureaucracy was widely felt by the population.[23]

The occupation attempted to bring about reforms relating to the recruiting, powers and functions of the bureaucracy. These reforms were only partially realized and the weight of the bureaucracy in Japanese society is still great. The predominance of the executive function guarantees the continuation of a broad and powerful role for the bureaucracy. It is a career service while legislators must periodically expose themselves to the perils of the electoral process. This circumstance provides the former with a degree of continuity that additionally supports their dominant position. The role of the executive and hence of the bureaucracy in the legislative process further strengthens their position within the government. Finally, a significant number of bureaucrats, retaining their bureaucratic outlook and affiliations, turn politician after retirement from government service. This fact is widely regarded as a further inhibition on the power of the Diet vis-à-vis that of the executive branch.[24]

Yet the power position of the bureaucracy is an uneasy one. The bureaucracy's past history of arrogance in attitude and performance, its role in the old authoritarianism, its remaining bureaucratic attitudes (in the invidious sense), its current role in a vast array of administrative matters relating directly and indirectly to daily life, and its power position in government and politics have made many Japanese acutely sensitive to specific bureaucratic misbehavior as well as general abuse of bureaucratic power. This sensitivity is neither repressed nor suppressed; it is constantly revealed in the many forms of public discourse. However, as compared with the unhappy past, a drastic improvement has taken place in the quality of the relations between the government and the people, as will be discussed below.

A final question relating to intra-governmental relationships concerns the role of the judiciary, especially that of the Supreme Court.

[23] On the prewar position of the bureacracy see Maki, *The Role of the Bureaucracy in Japan*, 20 PACIFIC AFFAIRS 391-406 (1947).

[24] For an excellent brief account of the post-1945 role of the bureaucracy, see N. IKE, JAPANESE POLITICS (1957). Time has not blunted its pertinence.

Theoretically the judiciary enjoys a monopoly over "the whole judicial power." The Supreme Court is "the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act."[25] This would seem to place the Court in a position to overrule acts of the "highest organ of state power" (the Diet), as well as acts of the dominant executive branch. In fact, it has done neither.

The judiciary, however, has experienced no serious challenge to its position from the other branches of government. The executive has never attempted to encroach on the judicial power; and on the one occasion when a legislative committee attempted to interfere with a judicial decision, in an emotionally charged murder trial, the Supreme Court strongly and successfully asserted the complete independence of the courts.

On the other hand, the Supreme Court has developed the view that it can exercise its power to declare laws or acts of government unconstitutional only when the violation is flagrant beyond question.[26] In all other cases the Court has stated that the fault can be remedied by legislative or political means; that is, a constitutionally ambiguous law can be amended by the Diet ("the highest organ of state power"), the offending cabinet minister or party can be held responsible by the electorate, or a government can be deposed by a nonconfidence vote. Thus, the judiciary has jealously guarded its own powers, while refusing to intrude into the areas deemed reserved to the legislature or executive.

D. The Relationship Between the Government and the People

We have examined the structure and responsibilities of the government as constitutionally determined and have observed how the relationships between the branches of the government have evolved in actual practice. The questions next considered examine how government is actually involved with the broad operations of Japanese society and hence how it impinges on the daily life of the people.

To understand the relationship between the government and the people as a component of the Japanese constitutional style it is necessary to consider both the negative and the positive aspects. The negative aspect relates to what is not present, namely, the elements of the old authoritarian relationship that have been eliminated; the positive

[25] JAPANESE CONST. art. 81.

[26] For a statement by the Court on this issue, see *The Constitutionality under Article 9 of United States Bases in Japan*, in J. MAKI, COURT AND CONSTITUTION IN JAPAN 306 (1964).

aspect relates to government services and welfare activities that have either been vastly expanded or newly added.

As is true under any authoritarian system, executive power previously was both supreme and oppressive. The system of universal male conscription which operated for almost three-quarters of a century exposed the majority of the male population to the training, indoctrination and discipline typical of the garrison state. In contrast, the Self Defense Forces are manned solely by volunteers. Total personnel amounts to less than one percent of all Japanese males. The training, indoctrination and discipline are much looser than under the previous system. As a result, the impact of the military establishment, as a segment of the executive branch, on the population is negligible.[27]

Under the old order the Ministry of Education had full control over the entire educational system, including curriculum, teachers and textbooks. Even the small number of private schools could not entirely escape centralized control. Today the system is vastly different. Although the Ministry of Education has regained a degree of administrative control over schools on all levels, including the power to designate approved textbooks, schools and school systems enjoy great freedom from government control.[28] There is, in addition, nothing even remotely resembling the process of indoctrination that was a central concern of the old system.

The former Ministry of Home Affairs operated Japan's government police system which was the main instrument for imposing authoritarian control over the population. The old police not only maintained law and order in the normal sense; they also carried out censorship operations—both political and moral—and functioned as a political police controlling and suppressing activities of individuals and organizations even remotely suspected of being subversive. The police also have been decentralized. Although the National Public Safety Commission, an organ of the Cabinet, has general administrative and supervisory control over the local police organizations, there is nothing that resembles the old government police.[29] The Constitution with its guarantees of individual freedoms and due process, new police training

[27] For some observations on the role of the Self Defense Forces, see Buck, *The Future of Japan's Armed Forces*, 7 ASIAN SURVEY 597 (1967).

[28] For an excellent factual analysis of the Japanese educational system see MINISTRY OF EDUCATION, EDUCATION IN JAPAN: A GRAPHIC PRESENTATION (1964). For a good analytical survey of education in Japan over the past two centuries, see H. PASSIN, SOCIETY AND EDUCATION IN JAPAN (1965).

[29] For a brief account of the organization of the police system, see J. MAKI, *supra* note 22, at 100-02.

and police methods, and constant vigilance on the part of those who suffered at the hands of or who fear a return of the old system provide a guarantee that police activities will remain within the accepted boundaries of the maintenance of law and order.

Finally, under the old system the administration of justice was under the control of an arm of the executive branch, the Ministry of Justice. The ministry was responsible for the prosecution of all violators of the law. It was also responsible for the administration of the courts. In addition, criminal law and criminal procedure, as might be expected under such a system, were weighted in favor of the state. As was mentioned earlier, ten articles of the Constitution guarantee the rights of the accused before the courts, and on that basis both the Criminal Code and the Code of Criminal Procedure have been revised to favor the accused.[30] These changes along with the constitutional creation of an independent judiciary have eliminated the authoritarian and consequently arbitrary administration of justice that weighed heavily on the people under the old system.

Article 25, paragraph 2, of the Constitution sets forth the positive functions of the state: "In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health." These considerations were by no means ignored under the old constitutional system, any more than they can be ignored under any operative government, but they were secondary to and supportive of what were deemed more important matters, such as the advancement of militaristic and nationalistic goals at home and abroad.

The state, operating through the executive arm but on the basis of enabling legislation and appropriations, has lived up to the above constitutional mandate. Its operation can be observed in such concrete forms as an efficient network of public transportation; the development of highways; economic policies and practices designed to serve the interests of economic groups (farmers, workers, and businessmen, large and small) and to raise the general level of national prosperity and economic well-being; the development of public housing; and all the usual social services. Japan's system is not perfect, but it is better than anything that the people have ever enjoyed in their long history and comparable to those of many of the self-styled advanced nations

[30] For a description of the abuses under the old system which were the targets of the revision, see Blakemore, *Post-war Developments in Japanese Law,* 1947 WIS. L. REV. 632, 649-52.

of the West. It is under the umbrella of such benevolent policies and practices of the government that Japanese individuals, groups and organizations have been able to achieve their present high degree of material comfort and well-being.

The structure, relationships and processes of government contribute to the composition of the constitutional style because of the presence of the following characteristics: a well-defined and sacrosanct sphere of power for each of the three branches of government; a constitutional specification of legislative supremacy more or less negated by the factual situation in which the executive branch is dominant; a relationship between the governmental process and the people in which the legislative branch is representative of the people and responsible to the people through the electoral process, the executive branch exercises a control which on balance is benevolent, and the judicial branch while not serving as a fighting guardian of popular rights nevertheless protects the legal rights of the people under a guarantee of constitutional due process. In its abstention from infringement of constitutionally guaranteed freedoms, in its representative nature as revealed in the fact that it is controlled by individuals and parties who have gone to the people in free elections to win their right to political power and therefore control over the government, and in its operation within defined constitutional limits, the governmental process in Japan is democratic under any working definition of that term. This governmental process has contributed much to the distinctive nature of the Japanese constitutional style.

III. ASPECTS OF THE JAPANESE CONSTITUTIONAL STYLE

We have examined the Japanese constitutional style as it has flowed from and been shaped by history, government, politics and the Constitution itself. The Constitution has also been woven into the society in other areas which seem somewhat remote from constitutional concerns but which are of critical importance to the integration of the Constitution into the national life and consciousness. An examination of these aspects of the constitutional style follows.

A. Formal and Informal Education

The firm integration of the study of the Constitution and its meaning into the educational system is of prime importance in the new Japanese constitutional style. On the upper levels of the academic world there has been an explosive flowering of the field of constitu-

tional theory. It has been estimated that in the first ten years of the present Constitution more books on constitutional theory and commentary had been published than had appeared during the almost sixty years of existence of the Meiji Constitution.

Japanese constitutional scholars do not simply write for each other. Constitutional law is a required subject for students in the faculties of law of Japanese universities. The faculties (departments) of law are not concerned with education for the legal profession, but with the study of law in general: the Constitution, the Criminal Code, the Code of Criminal Procedure, the Civil Code, the Code of Civil Procedure, and the Commercial Code. Future members of the legal profession—members of the bar, public prosecutors and judges—are drawn from among the best students in the faculties of law for special study at the Legal Training and Research Institute.[31] Also the study of law is a near prerequisite for a civil service career and for the business profession, especially with large companies. Obviously, it is in the faculties of law that future legal academicians get their preliminary exposure to the serious study of the Constitution and constitutional issues. It should be mentioned here that the overwhelming majority of constitutional scholars, both young and old, are ardent supporters of the present Constitution.

The critical and obvious point here is that potential leaders and all those to be engaged in key areas of public and private affairs in the future are exposed to constitutional theory, analysis of the content of the Constitution, constitutional judicial decisions, and other aspects of constitutional study. Thus, they acquire an important set of attitudes relating to the Constitution and a feel for the issues of constitutionalism.

Study of the Constitution is not limited to the upper level of the educational system. A study of the content of the Constitution, its general nature, and even specific constitutional issues (notably Article 9) is a core feature of social studies, particularly in middle and higher schools.[32] Constitutional study on this level is regarded not only as

[31] Perhaps the best English account of this Institute is Matsuda, *The Japanese Legal Training and Rearch Institute*, 7 AM. J. COMP. L. 366 (1958). The author later became a justice of the Supreme Court.

[32] A typical middle-school textbook is GENDAI NO SHAKAI (Contemporary Society) (Y. Okada ed. 1967), which devotes more than half of its section on politics to a discussion of the Constitution and matters directly related to the Constitution. A high school textbook, SEIJI: KEIZAI (Politics: Economics) (R. Mutai ed. 1966), devotes one of its three chapters to the Constitution and about a third of another to the problem of constitutional revision.

good in itself, *i.e.*, as a part of the general civic education of the students, but also as part of the important task of preparing students to take and pass entrance examinations to the universities.

The result of the attention paid to the Constitution in the educational process is not the creation of a nation of constitutional experts, but the diffusion among the general population of an awareness of the Constitution, the issues it raises for the people themselves, and its significance to the kind of society in which the Japanese are living.

Beyond formal education is the informal continuing education which comes from the daily impact of the media of mass communication. The Constitution is news in Japan. Major constitutional judicial decisions are reported prominently and discussed editorially. Anniversaries of the Constitution are marked with news items, color stories and roundtable discussions featuring prominent constitutional experts. Similar attention is paid to the Constitution in radio and television. Widely circulated journals of opinion frequently give prominent play to constitutional articles and discussions. If a constitutional problem of general interest arises, it is frequently dealt with in the mass circulation weekly magazines.

Thus, the Constitution is regularly before the Japanese public in all the media of mass communication. Again, the information does not necessarily penetrate into the consciousness of readers, listeners and viewers to become the foundation of consciously felt attitudes; but the mass media do contribute to the development and maintenance of a public atmosphere in which the Constitution is an element. Awareness of the Constitution does not end with the formal years of schooling.

B. The Role of the Intellectuals

Of all the groups in Japanese society that have revealed a specific concern with the problems of contemporary constitutionalism, the intellectuals are by far the most important.[33] It follows naturally from the role of education and the mass media that teachers, professors, newspaper and radio correspondents, television and radio commentators, editorial writers, and authors of think-pieces for journals of opinion constitute the core of the groups commonly referred to as intellectuals. In addition, some labor union officials and political party

[33] 2 J. SOC. & POL. IDEAS IN JAPAN (No. 1 April 1964), is devoted entirely to the historical and contemporary role of intellectuals in Japan. *See also* the chapter on the intellectuals in N. IKE, *supra* note 24.

officers, scientists, technicians, writers, essayists, artists, and professional men also fall into this category. As a group, intellectuals have demonstrated that they are positive defenders of the Constitution being particularly alert to any danger, real or imaginary, actual or potential, that may threaten it. Of equal significance is the fact that they have not only commented intellectually on the Constitution but have also plunged into the thick of the struggle. They have written in a wide range of outlets from the most weighty of constitutional commentaries to children's books aimed at the development of constitutional consciousness among the young; lectured in the class-room, in public meetings and on radio and television; organized special groups for the study and discussion of the Constitution; gone into the streets in demonstrations revolving around controversial constitutional issues; and become deeply involved in the politics of constitutional revision.

It is also true that a minority of the intellectuals has played a prominent role in the movement favoring constitutional revision. They have been particularly interested in revision in those areas where, according to their views, it appears to be technically desirable or politically justifiable. Their emotional commitment, particularly to the support of a return to a constitution that conforms more closely to tradition as they view it, seems as strong as that of the intellectual majority that is opposed to them. Though their antagonists among the intellectuals charge that they are trying to destroy democratic constitutionalism, they have in their own fashion contributed to the broad discourse on the Constitution that has done so much to make it alive.

The role of the intellectuals, majority and minority alike, in the development of constitution-consciousness cannot be exaggerated. They more than any other group have made the Constitution a living instrument.

C. The Role of Controversy

Of great significance to the development of the Japanese constitutional style has been the role of controversy.[34] It has played such a vital role in political life because of the freedom guaranteed by the Constitution itself. In turn the cause of freedom has been well served by controversy precisely because so much of it has swirled about the

[34] *See* J. MAKI, *supra* note 22, ch. 9 for a discussion of the role of controversy in Japan's democratic system.

complex problems relating to the nature of freedom. The great crisis of 1960 centered on the security arrangements between Japan and the United States but at the same time it could not be sundered from the meaning of Article 9. Legislation relating to the organization and powers of the police, although it did not touch on any direct constitutional issue, raised the possibility of infringement of individual liberty through the exercise of state power; thus the controversy directly touched on a central issue of the new constitutional order. For some years a political issue of relatively minor scale, that of revising the Election Law so as to establish single-member constitutencies to replace the present multi-member system, has been under public discussion. Although on the surface this seems to be removed from any constitutional problem, one of the central items of debate has been the possibility that under the single-member system the Liberal Democratic Party would be able to control more than two-thirds of the Diet seats and thus to initiate constitutional revisions. By far the longest, most bitter, and broadest constitutional controversy has been that raging around Article 9. Indeed, perhaps more than anything else the controversy over Article 9 has operated to keep the Constitution in the forefront of the national consciousness.

The controversy began to stir even during the constitutional debate in the Imperial Diet in 1946 when questions were raised regarding its meaning and implementation. The height of the controversy was reached during the political crisis of 1960 over the ratification of the security treaty with the United States in a revised form.[35]

Even before the end of the occupation the Japanese government and its leaders were squarely confronted with the problem of national security. The unilateral renunciation of armed forces and war potential would certainly not inhibit an unfriendly nation from utilizing its military power to achieve a political objective in its policy toward an independent Japan. In addition, the general tensions of the cold war, unfriendly pronouncements directed at the Japanese government from both the Soviet Union and Communist China, pressure from the United States government for Japanese rearmament, and the Korean conflict a few hundred miles away forced the Japanese government to create a new military establishment. In July, 1950, as a direct consequence of the outbreak of the Korean conflict the occupation told the Japanese government to establish a para-military force, the

[35] The definitive work in English on the crisis is G. PACKARD, PROTEST IN TOKYO: THE SECURITY TREATY CRISIS OF 1960 (1966).

National Police Reserve, which was designed to assist the ordinary police in the event of an internal insurrection. A few months after the end of the occupation in April, 1952 the National Police Reserve was replaced by the National Security Force after an intense legislative battle. Finally, in 1954 the present Self Defense Forces were created by law after an even more bitter battle.[36] Since then, the Self Defense Forces, Article 9, the defense budget, defense policy, the alliance with the United States and related items and issues regularly recur as topics of intense parliamentary debate.

One of the most famous and significant of the Supreme Court's constitutional decisions involved the constitutionality of American bases in Japan. The Court upheld the constitutionality of the bases, but pointedly refrained, because it was not at issue, from ruling on the constitutionality of the Self Defense Forces which seem patently in violation of both the letter and the spirit of Article 9.[37]

It is an essential feature of the Article 9 controversy and consequently of the Japanese constitutional style that the apparent violation of that article by the creation and continued existence of the Self Defense Forces has not subjected the constitutional system to severe strain. The broad configuration of the world strategic situation, Japan's position therein, the modest size and budget of the military establishment, the prohibition of political activity by Self Defense Forces members as written into the enabling legislation and adverse public sentiment have all walled in the forces so that they have been able to play only a very minor role in the national life and what amounts to none at all in politics. Yet many Japanese have voiced concern that their very existence may operate to reduce public confidence in and respect for other constitutional provisions and guarantees and hence the constitutional system itself.

As Article 9 with its highly idealistic renunciation of war has been one of the fundamental principles of the Constitution and hence a basic element of the constitutional style, so will the continuing controversy over it remain one of the outstanding features of the constitutional style.

D. Social Relations

Of all the provisions of the Constitution those dealing with social

[36] Maki, *Japan's Rearmament: Progress and Problems*, VIII WEST. POL. Q. 545 (1955), contains a discussion of the major provisions of the Self Defense Forces Law.

[37] For this decision see J. MAKI, COURT AND CONSTITUTION IN JAPAN 298 (1964).

relations seemed most unrealistic, most foreign in flavor, least in conformity with either the traditions or actual state of Japanese society in the postwar period, and least likely to persist. Articles 13, 14, and 24 contain the principal provisions relating to the individual relations among individuals and the relationship between the individual and his society. Article 13 provides that all people "shall be respected as individuals," the clearest statement in the constitution of the doctrine of individualism. Article 14 deals with two primary issues, equality under the law and the prohibition of discrimination "in political, economic or social relations because of race, creed, sex, social status or family origin." The most important provisions relating to nondiscrimination were those involving sex and social status. Twenty years ago Articles 13 and 14 were regarded at best as being harmless statements of general principles to which obeisance had to be made as a matter of democratic good form, and at worst as demonstrations of the ignorant contempt of the occupation in its dealings with many elements of the Japanese social tradition.

Article 24 seemed to be even more out of line with Japanese attitudes and social values than Articles 13 and 14. It deals with the institution of marriage, the rights of women, and the equality of the sexes. Marriage, it states, "shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with equal rights of husband and wife as a basis." It also called for the enactment of laws relating to "choice of spouse, property rights, inheritance, choice of domicile, divorce, and other matters pertaining to marriage and the family" to be based on "individual dignity and the essential equality of the sexes." In a society in which marriage was regarded as a matter of family decision, not of the individuals involved, and in which both law and custom impaired, if not denied, the individual dignity of women, such provisions seemed ill-conceived, or frivolous, or simply another humiliating heel-print of the victor on the social fabric of the vanquished.

In the extensive revision of the Civil Code which followed the promulgation of the Constitution, these constitutional statements were converted into concrete legal provisions. Many Japanese have professed belief that the Constitution and certain sections of the Civil Code are responsible for unfortunate and undesirable sociological consequences. The constitutional provision calling for respect of all people as individuals has in the view of many loosened the relationship

between parents and children, thus undermining the traditional responsibility of grown children to care for their parents. The striking increase in the rate of juvenile crime and juvenile delinquency during the past twenty years has also been laid to the reciprocal interaction of emphasis on the individual, deterioration of the control of the father over the children and the consequent decline of parental authority, and antisocial conduct of the young.[38] To link constitutional and legal provisions to certain social phenomena in a cause-effect relationship is sociologically naive, but the assertions have significantly broadened public concern about constitutionally related problems.

It is probable that the broad social changes that have taken place in Japan during the past twenty years would have occurred even if the Constitution had been completely mute on the status of the individual and the family; certainly the changes that have taken place since 1947 will not be negated nor will future change be prevented by the elimination of those provisions of the Constitution thought to be the sources of evils or defects in contemporary Japanese society. The fact remains however, that constitutionalism in Japan finds a source of vitality in this ongoing debate over the relationship between the fundamental law and social change.

E. The Revision Issue

The movement for revision has been a prominent feature of the constitutional style. The issue inevitably arose because the Constitution was drafted and enacted under a military occupation. In the vanguard of the revisionists are the conservatives, inside and outside the Liberal Democratic Party, especially those in the 50-and-over age group. They believe that Japan should have a constitution of, by and for the Japanese alone conforming closely to Japanese history and tradition as they understand it. They advocate a wide range of changes affecting: the position of the Emperor, Article 9 (to include recognition of the "inherent right" of self defense), the language of the document, the structure and functions of government (such as advocating a different role for the House of Councillors, a restatement of the principle of local government and the direct election of the Prime Minister), the articles dealing with social relations, and the

[38] Older witnesses appearing at the public hearings held by the Commission on the Constitution repeatedly expressed their concern over these problems, relating them to the provisions of the Constitution under discussion here.

principle of the public welfare (a broader application desired). The breadth of discontent is obvious from this partial listing of proposals. However, the revisionists loudly assert that they wish to maintain unchanged the three basic principles of the Constitution, apparently oblivious of the fact that many of the changes they advocate would seriously modify them.

In general the anti-revisionists have adopted the view that regardless of the conditions under which the Constitution came into existence, and the degree to which its provisions or spirit may be foreign-inspired or inconsistent with Japanese history and tradition, it has brought to the Japanese people a highly desirable array of freedoms and a democratic system that must be preserved at all costs. The seriousness of the alleged defects in the Constitution is minimized and said to be a small cost to pay for the great and obvious benefits.

The debate over Article 9 has been as lengthy and as pervasive as the debate over revision in general. Constitutional theorists deal with revision as an unavoidable issue; articles in journals, magazines, and newspapers have appeared; books have been written on the subject; organizations for and against revision have been formed; and it has been a persistent issue in national political campaigns. Revision will be a major political issue as long as controversy surrounds the content of the Constitution and as long as emotions can be aroused over its alien inspiration.

The outstanding development in the revision struggle has been the Commission on the Constitution.[39] Formed in 1957 after a bitter battle in the Diet, the Commission operated for almost seven years before its work was completed and its final report submitted.[40] The law establishing the Commission described its duties as follows: "To add to the studies of the Constitution of Japan, to investigate and deliberate on problems relating to it, and to report the results to the Cabinet and through the Cabinet to the National Diet."[41]

In the beginning it was generally believed that the true mission of the Commission was to produce recommendations which would allow the government, controlled by the Liberal Democrats, to accomplish an extensive revision of the Constitution. However, although

[39] On the Commission, see Ward, *The Commission on the Constitution and Prospects for Constitutional Change in Japan*, 24 J. ASIAN STUDIES 401 (1965).

[40] For a brief summary of the final report plus the twelve volumes of appended documents that accompanied it, see Maki, *The Documents of Japan's Commission on the Constitution*, 24 J. ASIAN STUDIES 475 (1965).

[41] *Id.* at 475.

it was clear from the beginning that a majority of Commission members favored revision, there was a core that firmly restisted it. The chairman of the Commission and the leader of this anti-revisionist group was Professor Kenzō Takayanagi.

A very lengthy final report with voluminous supplementary reports resulted from the Commission's work. The report did not recommend revision, but it was made clear that a majority of Commission members did favor an extensive list of revisions. As required by law the report was submitted to the Cabinet and placed under additional investigation by the influential Cabinet Bureau of Legislation; but four years later, the report still had not been submitted to the National Diet as the law required. Consequently, there is no indication that the report was furthered the cause of revision.

The Commission on the Constitution has contributed to the Japanese constitutional style because its enormous collection of documentary materials sheds light upon almost every facet of constitutionalism in Japan since the end of the Second World War.[42] This material constitutes the written record of the deliberations of the Commission and its numerous committees and subcommittees. To the best of my knowledge no other government has ever carried out such an exhaustive examination of its constitution. The long deliberations and the resulting massive documentary legacy of the Commission, not only provide material for a better understanding of every constitutional issue confronting Japan, but also stand as a significant facet of the Japanese constitutional style.

IV. Conclusion

In the short space of twenty years the Japanese have developed a constitutional style with the following salient characteristics: a firm commitment not only to maintain the present constitutional system, but to prevent a return to any features of the old system; the conversion of broad principles into a working structure of government and politics; the enjoyment of a wide range of fundamental freedoms; the active defense of the Constitution and its system by intellectuals with broad popular support; the systematic inculcation of knowledge of the Constitution and constitutional problems into the society through the operation of both formal education in the schools and informal education through the mass media; a broad and effective

[42] *See*, Maki, *supra* note 40, for a complete description of all the published documents of the Commission.

debate on a wide range of constitutional problems; and a national government which, if not ideally responsible to the sovereign people, has demonstrated that it is aware of and sensitive to the needs and demands of the society it governs. Such a constitutional style means that Japan has a viable constitution, viable because it has become a part of the processes of Japanese society.

How was it possible for the Japanese to develop a new and complex constitutional style in approximately two decades? To provide a definite answer may be impossible, yet the following four points may constitute an approach to an answer.

A. The Creative Crisis of 1945-1952

More than twenty years after the fact it has become clear that the crushing military defeat in the Second World War and the subsequent military occupation, dominated by the United States, were not simply events of great, indeed unprecedented, magnitude in Japanese history. Rather, they were both the causes and the manifestations of a crisis in the development of Japanese society, a crisis both truly creative and partially destructive. It was a crisis not simply because of the trauma of an overwhelming military defeat and the great physical suffering and devastation arising from the massive military blows of the later stages of the war; it was a crisis also because an occupying power attempted successfully to eliminate certain features of the country's political, social and economic structure. The Japanese people made it clear that they either actively rejected those same features or passively accepted their destruction, elimination or drastic modification.

The crisis was creative because in many respects the present state of Japanese society is a marked improvement over anything in the past. The world is familiar with Japan's economic miracle which is characterized by a higher level of material well-being and comfort than the Japanese have ever before enjoyed. Politically, the very fact that Japan has a growing democracy reveals the acceptance and integration of what was regarded as an alien political system. Sociologically, the Japanese have welcomed or accepted, even generated, a number of highly significant social changes. Although many Japanese have expressed dissatisfaction with these creative developments, the fact remains that they have become characteristic features of Japan today.

The significance of this creative crisis to the development of a

Japanese constitutional style is simply that the Constitution was thoroughly woven into almost all aspects of Japan's changing society. As emphasized earlier, no matter what the circumstances of the origin of the instrument itself, it was directly related to both the rejection and the renunciation of a hated past, and the institution and integration of new patterns of social action which initially were only hopeful parts of a new social order.

The prime consideration is not that the Constitution was the cause of the creative aspects of the crisis, but the more modest, but not less significant, fact that it was embedded in the whole process of the creative crisis.

B. Popular Capacity for Political Response

"Popular capacity for political response" means simply that in the formulative stages of the development of the constitutional style there was present in Japan's political society the potential for a broad, if not universal, reaction to the issues raised by the Constitution. Realizations of this potential would include everything from the reaction to the release of the draft revision in March, 1946 down to the current controversy over revision.

What were the sources of this capacity? Clearly, one of the most important was the existence of universal adult literacy. This was the essential foundation for the communication of information and opinion through the medium of the printed word, a process which, as already noted, has been one of the outstanding features of the Japanese constitutional style. Closely related to literacy is the existence of an operating system of mass communication, the press, radio, motion pictures, and recently television. These were the means by which the constitutional debate was deeply injected into Japanese political discourse, ranging from conversation to demonstrations in the streets.

Of course, there was the additional fact of popular exposure to politics and the political process going back at least to the decade of the 1870's. Even though the authoritarianism of 1930 to 1945 was antidemocratic and stifling to freedom of expression, it was also designed to get the population totally involved in the political process, although that process was quite the reverse of a democratic one. However limited political participation in the constitutional democratic sense may have been under the old system in comparison with what has been developed since the end of the Second World War, the fact

remains that the Japanese people were not ignorant of politics and the political process. The development of the constitutional style was in effect simply a very drastic change in the content of the political discourse.

C. *The Institutional Base*

Implicit in the discussion of both the creative crisis and a capacity for political response is an issue of paramount importance: the broad institutional base upon which the constitutional style could be erected.[43] The educational system, three-quarters of a century old in its modern form at the end of the Second World War, was not only the fountain of universal literacy, but as emphasized earlier the means by which the post-war constitutional generation could be nurtured on the new Constitution. The system of mass communication was also an established and effectively operating instrument of informal education.

The political parties, revived in the early stages of the occupation, were prepared, even anxious, to seize upon the issue of constitutionalism in their competition for political control. Lacking as it was in democratic provisions, the 1889 Constitution nevertheless had provided the Japanese with more than half a century of experience under a constitutional system. In addition, the pre-1945 legal system was thoroughly integrated into the old order. Therefore, it was a relatively simple operation to revise the existing legal codes so that they would be in conformity with a new constitution. Though hundreds, if not thousands, of the provisions of the new legal codes were different from those of the old, they were still part of a legal system which had been a part of Japan's society for many decades.

It is precisely because there existed in Japan a solid and time-tested framework of political, social and legal institutions that it was possible to develop a characteristic style in the operation of these institutions in relation to a new fundamental law.

D. *Constitution and Society*

It is a truism of modern constitutionalism that a constitution can be viable only if it conforms to the practices and values of the society for which it is to be the guiding fundamental law. This truism has emerged from the experience of the constitutional states of the West in the modern world.

[43] I have applied this same point to the broader problem of the development of democracy in Japan. *See* J. MAKI, *supra* note 22, at 30-32, 74-75.

In the case of Japan it was the clearly apparent gap between the new Constitution and Japanese society, history (both ancient and modern) and tradition that led most observers to the not unreasonable conclusion that the new Constitution might most accurately be described as an interesting experiment conducted by interested aliens. The inaccuracy of this forecast was not the fault of those who made it. Rather it must be traced to the lack of an historical parallel providing a basis for an evaluation of the whole process of integration into a society of an "alien" constitution.

In the final analysis it is perhaps not inaccurate to state that the development of a new Japanese constitutional style is a measure of the recasting of Japanese society over the past twenty years, a recasting which began under the impact of military defeat and the coercive thrust of a foreign occupation but developed rapidly and most significantly due to the constructive and integrative response of the Japanese people themselves who have undertaken one of the broadest and to date most successful tasks of social engineering that the twentieth century has witnessed.